

**In the United States Bankruptcy Court**  
**for the**  
**Southern District of Georgia**  
**Savannah Division**

In the matter of:

JOHN DOUGLAS GALBREATH  
(Chapter 7 Case Number 99-60517)

*Debtor*

JAMES B. WESSINGER, III  
TRUSTEE

*Plaintiff*

v.

JOEL SPIVEY AND RONNIE SPIVEY,  
DOUGLAS ASPHALT COMPANY,  
JEAN S. GALBREATH,  
RICHARD A. EDWARDS and  
ALICIA G. EDWARDS

*Defendants*

Adversary Proceeding

Number 00-6017

**FILED**  
at 3 O'clock & 35 min P.M  
Date 11/5/02

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MB*

**ORDER DENYING SPIVEY DEFENDANTS' MOTION**  
**FOR EXCLUSION OF TRUSTEE'S VALUATION, EXPERT TESTIMONY,**  
**AND REPORT FOR LACK OF RELEVANCE**

Debtor John Douglas Galbreath's ("Debtor") involuntary Chapter 7 case

was filed on June 28, 1999, by three creditors<sup>1</sup> of Debtor. In this proceeding the Chapter 7 Trustee ("Trustee") seeks to set aside as fraudulent the transfer of Debtor's interest in a parcel of property on Hutchinson Island to Defendants Joel and Ronnie Spivey ("the Spiveys"). Trustee asserts three causes of action: actual fraud under 11 U.S.C. § 548(a), constructive fraud under § 548(a), and state law fraud under O.C.G.A. § 18-2-22(2). Trustee intends to introduce the expert testimony and report of Johnnie Ganem ("Ganem") for purposes of proving that the value of Debtor's interest transferred to the Spiveys exceeded the value of the consideration he received in exchange.

Defendants filed the instant Motion requesting the Court to exclude Ganem's testimony and report on two grounds. The first is that Ganem's valuation of the Hutchinson Island property as a whole and his opinions regarding the entire parcel are not relevant to the issues to be tried. This matter is a core proceeding identified in 28 U.S.C. § 157(b)(2)(H) over which this Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(1) and the standing order of reference of the District Court for the Southern District of Georgia pursuant to 28 U.S.C. § 157(a). The Court concludes, for the reasons set out below, that Ganem's testimony is not excludable for irrelevance.

The Spiveys' second stated ground for exclusion is that, to the extent Ganem's opinions and valuation might be relevant, the probative value of the evidence is

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<sup>1</sup> The Coastal Bank, Industrial Tractor Company, Inc., and Sunbelt Rentals, Inc. filed the involuntary petition.

substantially outweighed by the danger that admission of the evidence will cause unfair prejudice, confusion of issues, or mislead the jury, and should therefore be excluded pursuant to Federal Rule of Evidence 403. Because the Spiveys have requested a jury trial in this proceeding and have filed a Motion with the District Court for the Southern District of Georgia for withdrawal of reference from this Court, this Court shall not render a ruling on admissibility based on Rule 403. That question is properly left to the District Court if and when the reference is withdrawn.

#### SUMMARY OF RELEVANT FACTS

On February 11, 1999, Debtor transferred his 1/3 undivided interest in the Hutchinson Island property ("the Property") to the Spiveys. The purchase price for that interest was calculated by the Spiveys' accountant J. Carroll Purvis ("Purvis"). Dep. of Purvis at 35. Purvis, assuming that the fair market value of the fee simple in the Property was \$2.5 million, based on the appraised value at the time it was purchased by Debtor and the Spiveys, id. at 37-38 & 42, arrived at the value for Debtor's 1/3 undivided interest, id. at 35 & 41-42. He also assumed that a "discount re minority undivided interest" of 15-20% should be applied, but used alternative numbers of 10% and 15% in actually calculating the applicable discount. See Purvis's work papers (Ex. 56, Dep. of Purvis). These discounts indicated a value for Debtor's interest between \$734,000 and \$767,000. Id. Purvis chose to establish the value of Debtor's undivided 1/3 interest as the average of those two figures: \$752,000. Id.

The Spiveys allege that in exchange for his conveyance of the 1/3 interest in the Property, Debtor received approximately \$749,994, which reflected both satisfaction of secured debt owed by Debtor under the SunTrust note in the amount of \$608,654.16, Aff. of Joel Spivey ¶ 26, and satisfaction of \$141,339.61 in debt owed to the Spiveys which represented the down payment, debt service, upkeep, maintenance and other carrying costs incurred, but unpaid, by Debtor with respect to his 1/3 interest, id. ¶¶ 15, 27.

Ganem's deposition testimony and report show that the Property was worth \$3.7 million at the time of the transfer. The Spiveys assert that Ganem's testimony and report are irrelevant to a determination of the value of Debtor's 1/3 interest in the Property. They base their assertion largely on the following disclaimer contained in a portion of Ganem's report:

14. The value estimate applies only to the entire property, and cannot be prorated to individual portions or fractional interests. Any proration or division of interest will invalidate the value estimate, unless such proration or division of interests is set forth in the report.

Ganem Appraisal ("Basic Assumptions and Limiting Conditions" ¶ 14).

#### DISCUSSION

This matter involves determinations regarding constructive fraud under the Bankruptcy Code and actual fraud under the both the Georgia Code and the Bankruptcy

Code. Under the Bankruptcy Code, proof of constructive fraud requires a showing that the debtor “received less than a reasonably equivalent value in exchange for [the] transfer” of property. 11 U.S.C. § 548(a)(1)(B). Under the Georgia statutory provision in effect at the time of the transfer, an act by a debtor “shall be fraudulent in law against creditors and others and as to them shall be null and void” if that act was a “conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party.” O.C.G.A. § 18-2-22, *repealed by* Ga. L. 2002, p. 141, § 2 (effective July 1, 2002).<sup>2</sup> Under the Bankruptcy Code, proof of actual fraud requires a showing that the debtor transferred property “with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . indebted.” 11 U.S.C. § 548(a)(1)(A). The fact finder may infer actual fraud from the circumstances surrounding the transfer, Dionne v. Keating (In re XYZ Options, Inc.), 154 F.3d 1262, 1271 (11th Cir. 1998), and the presence of certain recognized “badges of fraud,” *see id.* at 1271-75 (identifying badges of fraud and discussing relevance of evidence to finding that badges of fraud existed). One indicium of actual fraud is a below-market price paid to the debtor in exchange for the transfer of an interest in property.

The actual value of Debtor’s 1/3 undivided interest in the Property is

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<sup>2</sup> The current provision states: “A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.” O.C.G.A. § 18-2-74.

relevant to a determination of whether or not the consideration paid was below fair market value. If that value were found to be below fair market value, that finding is relevant both to a determination of whether the transfer was for "reasonably equivalent value" and as circumstantial evidence of actual fraud.

Generally, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. In a federal court, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Where expert testimony is utilized to provide relevant evidence, the expert is required to have special knowledge that will "assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702. If the expert testimony does not assist the trier of fact, it is not relevant and should be excluded. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591, 113 S. Ct. 2786, 2795-96, 125 L. Ed. 2d 469 (1993).

Trustee contends that Ganem's testimony and report are relevant to a showing that the Spiveys paid Debtor less than fair market value for his 1/3 interest, in that they constitute: (1) expert opinion evidence relevant to establishing the fair market value of the Property; (2) evidence supporting the notion that a minority discount should not be applied in valuing a fractional interest in property which can be partitioned into three parcels

of equal value; and (3) expert opinion evidence relevant to establishing that the Property can be subdivided into three equal parts. Trustee also contends that Purvis's \$2.5 million valuation starting point was too low.

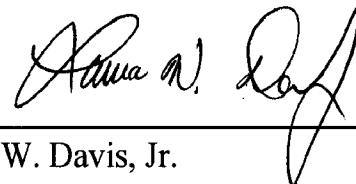
The Spiveys argue that the paragraph 14 disclaimer in Ganem's report and his testimony at deposition preclude any conclusions about the value of fractional interests and that his report is therefore irrelevant to a valuation of Debtor's 1/3 undivided interest. *See* Mot. for Exclusion ¶¶ 11-17; Br. of Spiveys, at pp. 10-12. Trustee argues, however, that the disclaimer is "obviously provided to prevent the user from taking the appraised value of the whole property and dividing it by the number of owners to determine the value of a partial interest in the property." Tr.'s Response, at p.10. Trustee further notes that the Spiveys' expert valuation also used, as a starting point, the value of the Property as an undivided whole, *id.*, and argues that Ganem, as an appraisal expert, knows when and how to determine the value of a partial interest in property from the value of the property as a whole, *id.*

Trustee's contention is persuasive as to the relevance of Ganem's report and testimony. The evidentiary weight of Ganem's opinions is for the trier of fact to determine. *See* Fed. R. Evid. 104(b) & (e). It is not a "given" that the trier of fact would accept the opinion of Ganem or of any other expert as conclusive in its entirety. Relevance of expert evidence, however, is not conditioned upon conclusive acceptance by the trier of fact; rather,

the expert evidence need only "assist the trier of fact to understand the evidence or determine a fact in issue," Fed. R. Evid. 702. In this case, the trier of fact may be persuaded by the comparables of one expert and the methodology of adjusting those comparables of another expert. The trier of fact may be persuaded by some, but not all, of the comparables of both experts. The trier of fact may accept the notion, or the amount of, a minority discount or it may not. Ganem's opinion, his data, and his methodology provide assistance to the trier of fact in determining the value of Debtor's 1/3 undivided interest in the Property at the time of the transfer; thus, Ganem's information is clearly relevant and shall not be excluded.

**ORDER**

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that the Spiveys' Motion for Exclusion of Johnnie Ganem's valuation, testimony, and report for lack of relevance IS DENIED.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 4<sup>th</sup> day of November, 2002.